

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2021-0007-EXEC

IN THE MATTER OF THE REQUEST FOR STAY OF
WATER QUALITY CERTIFICATION BY TURLOCK IRRIGATION DISTRICT AND
MODESTO IRRIGATION DISTRICT

Order Denying Stay

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

On January 15, 2021, the State Water Resources Control Board's (State Water Board or Board) Executive Director issued a water quality certification (certification) under section 401 of the Clean Water Act for the Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14581, respectively.¹ The State Water Board received timely petitions for reconsideration of the certification from four groups of petitioners: (i) Turlock Irrigation District and Modesto Irrigation District (collectively, Districts); (ii) the City and County of San Francisco; (iii) the Bay Area Water Supply and Conservation Agency; and (iv) the Tuolumne River Trust, California Sportfishing Protection Alliance, Trout Unlimited, American Rivers, American Whitewater, Merced River Conservation Committee, Friends of the River, Golden West Women Flyfishers, Central Sierra Environmental Resource Center, Tuolumne River Conservancy, and Sierra Club Mother Lode Chapter.

The Districts' Petition for Reconsideration and Request for Stay (Petition) requests that the State Water Board withdraw the certification in its entirety. The Petition also requests

¹ In the Matter of Water Quality Certification for Turlock Irrigation District and Modesto Irrigation District, Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14581 (Jan. 15, 2021). The State Water Board has delegated authority to act on applications for certification to the Executive Director. (Cal. Code Regs., tit. 23, § 3838, subd. (a).)

that the State Water Board stay the certification during the period while the Board considers the Petition. This Order addresses only the Districts' request for stay. The merits of the Districts' and other parties' petitions for reconsideration will be decided at a later date. For the reasons below, this Order denies the request for stay.

2.0 BACKGROUND

The Don Pedro Hydroelectric Project and La Grange Hydroelectric Project (collectively, Projects) are located on the Tuolumne River in Tuolumne and Stanislaus Counties, California. On April 28, 2014, the Districts filed an application with the Federal Energy Regulatory Commission (FERC) for a new license to continue to operate and maintain the Don Pedro Hydroelectric Project. The license expired on April 30, 2016, and the Districts continue to operate the Don Pedro Hydroelectric Project under annual licenses. On October 11, 2017, the Districts filed an application for an original license with FERC to operate and maintain the La Grange Hydroelectric Project. The applications for a new and original license are still pending before FERC.

In December 2018, in response to the continuing decline of the Bay-Delta ecosystem, the State Water Board adopted amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) that include new and revised water quality objectives for the Lower San Joaquin River (LSJR) and its three salmon-bearing tributaries, the Stanislaus, Tuolumne, and Merced Rivers and revised salinity water quality objectives for the southern Delta. The LSJR flow objectives require a portion of flow be maintained in the three tributaries during certain times of year to ensure suitable habitat and migratory pathways for native fish.

Issuance of a FERC license is a federal action that requires certification under section 401 of the Clean Water Act. (33 U.S.C. § 1341.) Before FERC can issue a license, a section 401 certification issued by the State Water Board or a waiver of section 401 authority is required. In order to issue a certification, the State Water Board must have sufficient information to show that operation of the Projects is consistent with both water quality objectives and the protection of the beneficial uses designated for the Tuolumne River and the San Joaquin River in the Water Quality Control Plan for the Sacramento River Basin and the San Joaquin River Basin and in the Bay-Delta Plan. Any certification issued by the State Water Board must include conditions that implement these requirements and any other appropriate requirement of state law. (33 U.S.C. § 1341(d).

On July 20, 2020, the Districts filed requests with the State Water Board for section 401 certification of the Projects.² On October 2, 2020, the Districts filed a petition requesting

² Previously, the Districts requested certification for the Projects from the State Water Board on January 26, 2018, and April 22, 2019. The State Water Board timely denied the requests without prejudice on January 24, 2019, and April 20, 2020, respectively. The

FERC to find that the State Water Board has waived its certification authority for the Projects. On November 19, 2020, the Districts filed a formal withdrawal of their July 20, 2020 requests for certification based on their argument that the State Water Board had waived its certification authority under section 401. The State Water Board issued a draft certification for the Projects on November 30, 2020, and a final certification on January 15, 2021. On January 19, 2021, FERC denied the Districts' petition and found that the State Water Board had not waived its certification authority for the Projects.

The Districts timely petitioned the State Water Board for reconsideration of the certification and requested a stay pending the Board's reconsideration decision.

3.0 LEGAL STANDARD FOR STAY REQUESTS

A stay is extraordinary relief that is granted in few cases. In order to grant a stay, the State Water Board must find that a petitioner seeking a stay has alleged facts and produced proof of: (1) substantial harm to the petitioner or to the public interest if the stay is not granted; (2) lack of substantial harm to other interested persons and the public interest if a stay is granted, or the harm that would result from the stay being granted is substantially outweighed by the harm that would occur if no stay is granted; and (3) substantial questions of law or fact regarding the disputed action. (Cal. Code Regs., tit. 23, § 3869, subd. (d)(1)(A)-C.) A petitioner must provide facts and proof of each of the three factors in order for a stay to be granted. Failure to meet any of the elements will result in denial of the stay request.

In addition, the issue of whether a stay is appropriate is evaluated in the temporal sense—a petitioner must prove that it will suffer substantial harm if a stay is not granted for the relatively brief period pending resolution of the petition on the merits. (State Water Board Order WQ 2006-0007 (*Boeing Company*), p. 4; State Water Board Order WQ 2011-0007 (*Merced Irrigation District*), p. 6; State Water Board Order WQO 2002- 0007 (*County of Los Angeles*), p. 3.)³ Thus, the issue before the State

Districts, as lead agencies under the California Environmental Quality Act (CEQA), had not begun the environmental analysis required under CEQA, FERC had not completed its National Environmental Policy Act analysis, and the State Water Board could not determine compliance with water quality standards at the times the requests for certification were denied.

³ Certain water quality orders cited address requests for stay pursuant to California Code of Regulations, title 23, section 2053, which does not apply to this matter. Section 2053 applies to the State Water Board's review of an action by a Regional Water Quality Control Board. Nonetheless, section 2053 requires facts and proof of the same factors as those required by section 3869 and, thus, the discussion of the factors under section 2053 also informs the consideration of the factors under section 3869.

Water Board is not whether the Districts might prevail on any of the merits of their claims or suffer substantial harm over the term of the federal license(s), once issued.

4.0 DISCUSSION

4.1 The Districts have not shown substantial harm to them or to the public interest if a stay is not granted

The Districts allege that unless the certification is stayed, substantial harm will follow from implementation of the certification's requirements. They assert that the certification is immediately enforceable under state law (citing Water Code section 13385, subdivision (a)(5)) and that FERC could incorporate some or all of the conditions of the certification into the Districts' license(s) at any time. The Districts also cite to the declaration of Dr. Susan Burke in support of their petition for reconsideration and request for stay. The declaration includes a copy of Dr. Burke's report on "Estimating Changes in Agricultural Production Impact Assessment Methodology Technical Memorandum," dated January 15, 2021,⁴ which estimates the economic impacts of the certification on the agricultural economy of Stanislaus and Merced Counties over a 42-year study period for three metrics (output, jobs, and labor income), based on certain modeling assumptions.

State Water Board regulations specify, however, that a petitioner must show "substantial harm to the petitioner or to the public interest *if a stay is not granted.*" (Cal. Code Regs., tit. 23, § 3869, subd. (d)(1)(A), italics added.) The only costs relevant to an analysis for purposes of a stay are those costs that may be incurred pending the State Water Board's decision on the merits of the Districts' petition for reconsideration. The Districts' economic estimates do not reflect the actual costs that may be incurred during the reconsideration period because compliance with the certification is not anticipated while it is pending reconsideration, or, as discussed below, before FERC issues the federal licenses for the Projects.

Moreover, the Districts are unlikely to incur any significant actual costs associated with implementation of the certification before the State Water Board acts on the reconsideration request. The Districts do not provide any facts to support their suggestion that FERC could incorporate some or all of the conditions of the certification into the Districts' licenses before the State Water Board takes final action on the Districts' petitions for reconsideration. FERC's licensing process is ongoing, and the additional procedural requirements FERC must follow are almost certain to take substantially longer than the State Water Board will take to act on the Districts' petitions for reconsideration. For example, section 7 of the Endangered Species Act (ESA) requires federal agencies to consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service (NMFS), or both, before engaging in a discretionary action that may

⁴ The footer on the report is dated February 2021.

affect listed species or critical habitat. (16 U.S.C. § 1536.) By letter dated October 2, 2020, NMFS notified FERC that NMFS had closed out FERC's previous consultation requests pursuant to ESA section 7 and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq., due to inactivity. FERC has yet to reinstate its consultation with NMFS. There is no information to support the conclusion that FERC will imminently issue licenses incorporating some or all of the certification.

Additionally, the asserted prospect of enforcement by the State Water Board generally does not support a stay. It is not the State Water Board's practice to seek enforcement while a petition for reconsideration of a certification is pending. Even where the potential for civil and administrative enforcement were not speculative, the State Water Board has rejected the possibility, or even probability, of enforcement actions as justification for a requested stay because it is very unlikely that the enforcement action would be concluded during the time a stay was in place. (State Water Board Order WQ 2006-0007 (*Boeing Company*), pp. 9-10.) If enforcement is proposed or initiated, the District may seek reconsideration or a stay of the action at that time

Moreover, the State Water Board does not intend to enforce the certification conditions before the federal license is issued (and even then only if enforcement is warranted). In the context of state regulation of FERC-licensed hydroelectric projects, the state's exercise of its state law authority independent of section 401 of the Clean Water Act is subject to Federal Power Act preemption. (*Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330.)⁵ While section 401 makes applicants subject to the state's procedural requirements for certification, the requirement for compliance with the conditions of certification takes effect upon issuance of the federal permit or license. (33 U.S.C. § 1341(d).) Accordingly, there is substantial doubt that the state has authority to enforce the conditions of certification for a FERC-licensed hydroelectric project until and unless the license subjected to the certification is issued. Indeed, the State Water Board has never sought to enforce a certification before the license is issued. In sum, the possibility of enforcement by the State Water Board and, in particular, the conclusion of any enforcement action during the period a stay would be in effect, is far too speculative to warrant a stay.

The Districts have failed to prove substantial harm justifying a stay of the certification while their petition for reconsideration is pending.

⁵ State Water Board Order 2003-0017-DWQ does not apply here. The order applies to discharges of dredged or fill material regulated under Clean Water Act section 404 and issues water discharge requirements to persons who are proposing to discharge dredged or fill material where the discharge is also subject to Clean Water Act section 401 certification. It does not pertain to Clean Water Act section 401 certification of FERC-licensed hydroelectric projects unless expressly provided by the certification.

4.2 The Districts have not shown a lack of substantial harm to other interested persons and the public interest if a stay is granted

As with their argument concerning harm if a stay is not granted, the Districts' arguments concerning a lack of substantial harm to other interested persons and the public if a stay is granted fail to distinguish between harm during the period over which the State Water Board considers the petitions for reconsideration and harm during the 40 to 50 years the FERC license will be in effect. Because the burden of proof is on the Districts, this discussion briefly focuses on the arguments made by the Districts and does not speculate as to the arguments the Districts could have made if they had focused on the limited period a stay would be in effect. It bears emphasis that a stay will not be granted simply because there would be little harm in doing so—it also must be demonstrated that there will be substantial harm to the petitioners or the public interest from not granting a stay.

The Districts allege that a stay would not cause harm because the Legislature has already determined that the uses to which the Districts are putting their water are the highest uses and the certification does not provide any significant benefits. While the Districts fail to address harm during the relatively short period before the State Water Board acts on the petition for reconsideration, this order briefly addresses the issues raised by the Districts' arguments – one issue amounts to a legal argument regarding whether the State Water Board has authority to adopt conditions to protect instream beneficial uses and another mischaracterizes a model referenced by the Board in the environmental document supporting the Bay-Delta Plan amendments.

The Districts first cite to Water Code section 106, which expresses the policy of the state “that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.” The Districts suggest that it is improper to prioritize fish and wildlife beneficial uses in light of section 106, alleging that the certification would take water from these “highest” municipal and agricultural uses “and put it to environmental uses the Legislature has deemed less important.” (Petition, p. 72.) Thus, the Districts conclude, the “Legislature has already determined that the balance of harms tips strongly against the Order.” (*Ibid.*)

The priorities in Water Code section 106 are important, but they are not absolute. Water Code section 107 expressly declares that the declaration of policy in the same chapter (Wat. Code, §§ 100 - 113) “is not exclusive, and all other or further declarations of policy in this code shall be given their full force and effect.” Thus, section 106 must be considered in the context of other statutory declarations of policy that also establish policies for the administration and protection of the state's water resources. Importantly, the Porter-Cologne Water Quality Control Act establishes state policy that the “quality of all the waters of the state shall be protected for use and enjoyment by the people of the state” and “activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved” (Wat. Code, § 13000.) The State Water Board is thus required to formulate and adopt

water quality control plans consistent with this policy (§§ 13240, 13170) and which contain water quality objectives that will ensure the reasonable protection of beneficial uses (§ 13241). This includes the reasonable protection of fish and wildlife beneficial uses. (*Id.*, § 13050, subd. (f).)

The California Supreme Court has explained that the primary function of Water Code sections 106 and 106.5 (pertaining to municipal water rights) is to establish priorities among competing appropriators, but that the sections also declare principles of California water policy applicable to any allocation of water resources. (*National Audubon Society v Superior Court* (1983) 33 Cal.3d 419, 447, fn 30.) In the latter context, the Court explained that the policy must be read “in conjunction with later enactments requiring the consideration of in-stream uses . . . and judicial decisions explaining the policy embodied in the public trust doctrine.” (*Ibid.*) Thus, the Court concluded “neither domestic and municipal uses nor in-stream uses can claim an absolute priority.” (*Ibid.*) Contrary to the Districts’ assertion, section 106 does not support the conclusion that the weighing of harms tips against the certification.

The Districts also assert that setting aside the certification will not cause any significant harm to the environment because the SalSim analysis in the Substitute Environmental Document (SED) supporting the 2018 Bay-Delta Plan amendments⁶ shows that the unimpaired flows would have an insignificant benefit to salmon in comparison to the millions of fish produced from state and federal hatcheries. SalSim is a life-history population simulation model for fall-run Chinook salmon originating from the San Joaquin River and its upper three east-side salmon-bearing tributaries (Stanislaus, Tuolumne, and Merced Rivers) developed by the California Department of Fish and Wildlife and others. The Districts’ assertion mischaracterizes the State Water Board’s use of SalSim in the SED. The SED discusses the SalSim model’s application and limitations, including providing a “use advisory,” and is quite clear that the State Water Board did not rely on SalSim due to the model’s limitations, either for impact determinations in the SED or for its conclusions regarding fish benefits.⁷ Moreover, as explained in the SED, scientific information strongly supports the LSJR flow objectives, which require inflow conditions sufficient to support and maintain the natural production of viable native San Joaquin River watershed fish populations migrating through the Delta, and their substantial benefits.

⁶ Final Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Dec. 12, 2018).

⁷ For example, SalSim is discussed in SED Chapter 19, *Analyses of Benefits to Native Fish Populations from Increased Flow between February 1 and June 30*, and Master Response 3.1, *Fish Protection*, as well as in other SED locations.

Finally, the Districts' declaration addresses the modelled estimated economic impacts of the certification on the regional agricultural economy and does not provide any evidence of lack of harm to other interested persons or the public interest if the stay is granted.

4.3 Substantial questions of fact or law regarding the disputed action

The Districts point to arguments in their petition for reconsideration that there are substantial questions of law and fact regarding the certification. They assert that there is no jurisdiction for the certification, the certification violates the law, and the evidence does not support the certification. Because section 3869 requires a showing of all three factors discussed above, and the Districts have not shown substantial harm to them or the public interest, it is unnecessary to address the legal arguments in this order.

5.0 CONCLUSION

The Districts' request for a stay while a decision on their petition for reconsideration is pending is denied because the Districts have failed to meet their burden of demonstrating that (i) there will be substantial harm to the Districts or the public interest if the stay is not granted, (ii) neither the public interest nor other interested persons will suffer substantial harm if the stay is granted, and (iii) substantial questions of fact or law regarding the disputed action exist.

Nothing in this order implies a decision by the State Water Board on the merits of the Districts' petition for reconsideration. The merits of the petition will be decided at a later date.

March 15, 2021

Date



Eileen Sobeck
Executive Director

Certificate of Service

I hereby certify that I have this day filed electronically with the Federal Energy Regulatory commission and served the foregoing document upon each person designated on the official service list compiled by the Secretary for the Don Pedro Hydroelectric Project (FERC Project No. 2299) and the La Grange Hydroelectric Project (FERC Project No. 14581) proceedings.

Dated at Sacramento, California this 15th day of March, 2021.

Ann Marie Ore  Digitally signed by Ann Marie Ore

Ann Marie Ore
Water Quality Certification Program Manager
Division of Water Rights
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

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